No. 95-1653

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In the Supreme Court of the United States

OCTOBER TERM, 1995

KATHY ST. HILAIRE, INDIVIDUALLY AND AS EXECUTRIX FOR THE ESTATE OF PHILIP ST. HILAIRE,

PETITIONER,

v.

CITY OF LACONIA, LACONIA, NEW HAMPSHIRE, TOWN OF BELMONT, BELMONT, NEW HAMPSHIRE, COUNTY OF BELKNAP, LACONIA, NEW HAMPSHIRE, DETECTIVE DAVID A. GUNTER, OF THE LACONIA POLICE DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, SERGEANT BRIAN LOANES, OF THE TOWN OF BELMONT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, SERGEANT DAVID NIELSEN, OF THE TOWN OF BELMONT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEPUTY SHERIFF ROBERT DUPUIS, JR., OF THE BELKNAP COUNTY SHERIFF'S DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, DEPUTY SHERIFF DANIEL COLLIS, OF THE BELKNAP COUNTY SHERIFF'S DEPARTMENT, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS, CITY OF LACONIA, TOWN OF BELMONT, DETECTIVE DAVID A. GUNTER, SERGEANT BRIAN LOANES, AND SERGEANT DAVID NIELSEN, IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Petition for Certiorari should be granted, when the First Circuit Court of Appeals correctly relied upon the Supreme Court's recent decision in *Wilson* v. *Arkansas* in granting qualified immunity to the individually named respondents in their individual capacities.

2. Whether, in view of the correctness of the First Circuit Court of Appeals' Decision, the Supreme Court should grant certiorari to decide whether the objective reasonableness test for qualified immunity in Fourth Amendment excessive force cases is the same as the objective reasonableness test applied on the merits, or a more generous test for qualified immunity governs as in Fourth Amendment warrant cases.

3. Whether, in view of the correctness of the First Circuit Court of Appeals' decision, the Supreme Court should grant certiorari to determine when Fourth Amendment scrutiny should begin in a self-defense shooting case: at or near the time of the seizure (i.e., shooting) or the events leading up to it.

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APPENDIX

Appendix A — Errata sheet from the United States Court of Appeals for the First Circuit, Amending Opinion of the Court, Issued on December 1, 1995 1a

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is officially reported as *Kathy St. Hilaire, etc., Plaintiff, Appellant* v. *City of Laconia, et al., Defendants, Appellees,* 71 F.3d 20 (1st Cir. 1995), and appears as Appendix D of the Petition for a Writ of Certiorari.

The decision of the United States District Court for the District of New Hampshire is officially reported as *Kathy St. Hilaire* v. *City of Laconia,* 885 F. Supp. 349 (D. N.H.1995), and appears as Appendix E of the Pet. for Cert.

STATEMENT OF JURISDICTION

The judgment of the First Circuit Court of Appeals affirming the District Court for the District of New Hampshire's original judgment in favor of the defendants (App. E) was entered on December 1, 1995. (App. C.) By order dated December 15, 1995, the First Circuit enlarged the time for filing a petition for rehearing and suggestion for a rehearing en banc until December 29, 1995. (App. B.) By order dated January 5, 1996, the First Circuit denied the petition for rehearing and the suggestion for the holding of a rehearing en banc. (App. A.)

The jurisdiction of the United States Supreme Court has been invoked pursuant to 28 U.S.C. §1254 and 28 U.S.C. §2101(c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and

particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C. §1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

Three police officers in plain clothes and one in uniform rushed toward Philip St. Hilaire's vehicle. St. Hilaire, in the driver's seat, began to pull a gun on the officer by the passenger window. The officer shot in self-defense, giving rise to this unreasonable seizure claim under the Fourth Amendment. The issue below and in petitioner's Petition for Certiorari is whether the officers violated clearly established constitutional rights of which reasonable officers would have known.

Statement of Facts

The Belknap County Sheriff's Office conducted an investigation of drug sales from the business premises of Philip St. Hilaire, known as Laconia Auto Wrecking in Belmont, New Hampshire. Two controlled buys of cocaine and other corroborating information culminated in Sheriff's Deputy Robert Dupuis obtaining a search warrant at the Laconia District Court. The warrant, as authorized by the local judge, gave permission to search the person and business premises of Philip St. Hilaire for evidence of cocaine and drug sales.

That same day, April 27, 1990, Deputy Dupuis led a pre-raid planning meeting at the Sheriff's Department that included Respondents Detective David A. Gunter of the Laconia Police Department, Respondents Sergeant Brian Loanes and Sergeant David Nielsen of the Belmont Police Department, and other officers. It was agreed that the perimeter would be secured by uniformed officers in marked cruisers. Sergeant Nielsen, in uniform, and Sergeant Loanes and Deputy Dupuis in plain clothes would execute the warrant. Detective Gunter would then enter the premises with his drug dog. St. Hilaire was known to be armed and possibly dangerous.

Immediately following the meeting, the officers reconvened at the location of the search. Deputy Dupuis, Sergeant Loanes and Sergeant Nielsen positioned themselves in the woods behind Laconia Auto Wrecking. Belknap County Deputy Sheriff Daniel Collis monitored activity from across the street and was in radio contact with the execution team. Deputy Collis observed several people approach the door into Laconia Auto Wrecking. They shook the door, after which it appeared that someone inside unlocked it to allow entrance. Contrary to expectations, the door was locked, which required consideration of a breached entry. That contributed to the potential risk, as did the one-way glass on the building, which allowed the occupants to see out, but prevented the officers from seeing in. Detective Gunter was added to the raid team for reinforcement.

Deputy Collis then saw St. Hilaire lock the front of his business, enter the parking lot, and head toward his vehicle. Upon learning of this development from Deputy Collis over his portable radio, Deputy Dupuis, the raid leader, gave the command, "Let's go."

The execution team ran out of the woods and toward the rear of St. Hilaire's vehicle. Detective Gunter headed toward the rear passenger side, Sergeant Nielsen, the uniformed officer, headed toward the rear driver's side, and Sergeant Loanes and Deputy Collis followed. All had badges visible

and guns drawn. Most shouted or heard others yell combinations of "Phil," "Police," "Freeze," "Hold it." Once aligned with the passenger side window, Detective Gunter again shouted, "Hold it. Police," or words like that. St. Hilaire was facing forward, seated in the driver's seat, with the engine running, as officers approached.

At the window, Gunter held up his badge in his left hand and a revolver in his right. St. Hilaire turned to his right, making eye contact with Detective Gunter. St. Hilaire reached with his right hand to his right hip, which exposed what Detective Gunter believed to be a .45 automatic revolver. Detective Gunter shot — once — as Philip St. Hilaire reached for his weapon.

Immediately after the shooting, Chief McCarty of the Belmont Police Department removed Philip St. Hilaire's weapon from the front seat of the vehicle, where it lay next to St. Hilaire. Prior to its removal, Sergeant Nielsen observed that St. Hilaire's right hand was on top of the gun, which was on the seat to St. Hilaire's right. Sergeant Nielsen recognized that St. Hilaire was wounded in the throat. St. Hilaire was paralyzed from the neck down as a result of a single bullet lodged in his vertebra. He died approximately a year and a half later.

Procedural History

The plaintiff filed suit in the United States District Court for the District of New Hampshire under the auspices of 42 U.S.C. §1983, seeking damages against three municipalities and five individual officers. She alleged unreasonable search and seizure in violation of the Fourth Amendment on behalf of her decedent, with supplemental state law claims for negligence, intentional infliction of emotional distress and loss of consortium. The defendants filed motions for summary judgment based *inter alia* on qualified immunity.

The District Court granted the defendants' motions for summary judgment and dismissed pendent state law claims without prejudice. (App. E.) On the plaintiff's illegal search

warrant claim, the District Court found probable cause for the issuance of the warrant, even if the affidavit in support had been corrected to include allegedly omitted material. The District Court granted summary judgment in favor of the individual defendants on the illegal warrant claim based upon qualified immunity. (App. E at 34a.)

On the plaintiff's excessive force claim, the plaintiff contended that there were material facts in dispute that should preclude summary judgment in two separate areas: (1) that there were disputed facts regarding whether in fact St. Hilaire was reaching for a weapon, which questioned the authority of Detective Gunter to shoot in self-defense; and (2) that there were disputed facts regarding whether the defendants were identifying themselves as police officers. If not, according to the plaintiff's thesis, the "defendants unreasonably increased the likelihood that they would need to use deadly force by approaching St. Hilaire in plain clothes, with their guns drawn and without identifying themselves as police officers." (App. E 38a.)

The first argument the District Court easily dismissed as speculation. The plaintiff's factual allegations were insufficient to "create a genuine dispute as to whether Gunter reasonably believed he had to use deadly force against St. Hilaire to defend himself." (App. E at 38a.)

The plaintiff's second argument — that the officers unreasonably increased the foreseeable risk that St. Hilaire would react to their presence with violence — raised "more troubling questions" for the District Court. (App. E at 38a.) Acknowledging the existence of a fact dispute over whether the defendants identified themselves, the District Court assumed without finding that they had not (App. E at 38a n.2), then proceeded to determine whether the defendants nevertheless were eligible for a qualified immunity defense.

Citing *Anderson* v. *Creighton*, 483 U.S. 635 (1987) and lower federal court decisions, the District Court concluded that a more liberal level of review is sanctioned under quali-

fied immunity than the "objective reasonableness" test on merits consideration under the Fourth Amendment.

> Accordingly, an officer is entitled to claim qualified immunity in a police misconduct case even if he acted unreasonably unless the law under which the officer's conduct is deemed unreasonable was clearly established when he acted.

(App. E at 37a.) Noting "conflicting precedents" among federal courts, the District Court found that:

> [T]he law concerning whether a police officer who legitimately uses deadly force in self-defense nevertheless violates the Fourth Amendment by unreasonably increasing the likelihood that deadly force will become necessary was not clearly established when the defendants acted.

(App. E at 40a-41a.) Therefore, defendants in their individual capacities were entitled to summary judgment on the basis of qualified immunity. (App. E at 41a.)

The District Court dismissed the municipal liability claims against the City of Laconia, Town of Belmont, and Belknap County, as defectively premised on a *respondeat superior* theory. (App. E at 41a.) The Court dismissed the supplemental state law claims without prejudice pursuant to 28 U.S.C. §1367(c)(3). (App. E at 41a.) Those supplemental state law claims for negligence, intentional infliction of emotional distress and loss of consortium have been re-brought in Belknap County Superior Court in Laconia, New Hampshire.

The plaintiff appealed the District Court decision in favor of the defendants to the First Circuit Court of Appeals. The First Circuit affirmed summary judgment on behalf of the defendants on the unreasonable search (App. D at 34a) and municipal liability claims. (Respondents' Exhibit A, Amended Opinion at 1a.)

The First Circuit also affirmed the District Court's grant

of summary judgment in favor of the defendants sued personally. However, the Court of Appeals opined that both the defendants and District Court focused too narrowly on the moment of the shooting. (App. D at 18a—19a.) The issue on qualified immunity was not, as the District Court held, "whether there was any clearly established constitutional duty . . . to avoid creating situations which increased the risk of use of deadly force" (App. D at 19a), but rather, whether, at the time of the shooting in 1990, there was a clearly established constitutional obligation that police announce their identity and purpose as they approached St. Hilaire to execute the search warrant. (App. D at 21a.)

Framing the issue in that manner permitted the First Circuit a broader review of events, starting essentially at the time the one uniformed and three plain clothes officers rushed the St. Hilaire vehicle. As the District Court, the First Circuit found that whether the defendants yelled "Police," "Hold it," "Freeze," and the like was a disputed fact, but that it was not material to the outcome (App. D at 16a—17a), and therefore would not preclude the defendants from receiving qualified immunity if they violated no clearly established constitutional rights.

At the heart of the plaintiff's position was that a sort of out-of-doors equivalent to the common law knock-and-announce rule governed. Following the plaintiff's invitation to refer to this Court's recent decision in *Wilson* v. *Arkansas*, 115 S. Ct. 1914 (1995) for guidance, the First Circuit assumed without finding that the case controlled. (App. D at 21a.)

Nevertheless, to the extent that *Wilson* held that the common law knock-and-announce rule regarding the entry of dwellings formed part of the reasonableness analysis under the Fourth Amendment, that constitutional principle was not clearly established until that case was decided in 1995. (App. D at 21a—22a.) Because the defendants sued personally did not violate clearly established constitutional rights of which reasonable police officers would have known as they approached the St. Hilaire vehicle in 1990, they were pro-

tected from suit and judgment by qualified immunity. (App. D at 23a.)

In her Petition for Certiorari, the plaintiff has not raised the judgment below in favor of the municipalities or the judgment below in favor of all defendants on the unreasonable search claim. It is only the grant of qualified immunity on the individual capacity claims on the unreasonable force issue for which review is sought.

ARGUMENT

I. The Petition for Certiorari Should Not Be Granted, Because the First Circuit Court of Appeals Correctly Relied upon the Supreme Court's Recent Decision in *Wilson* v. *Arkansas* in Granting Qualified Immunity to the Individually Named Respondents in Their Individual Capacities.

Respondents herein are Detective David Gunter of the City of Laconia and Sergeant Brian Loanes and Sergeant David Nielsen of the Town of Belmont, individual officers sued in their individual capacities. Since the First Circuit Court of Appeals correctly applied this Court's recent decision in *Wilson* v. *Arkansas*, in granting qualified immunity on summary judgment, the Petition for Certiorari should be denied.

This case was initially brought with both unreasonable search and unreasonable seizure claims under the Fourth Amendment. Both the District Court and the Court of Appeals have awarded summary judgment on behalf of the defendants on the petitioner's claim challenging the validity of the search warrant. (App. E at 34a; App. D at 24a.) The petitioner elected not to seek review on certiorari of the illegal search warrant claim, and therefore that issue is not before this Court.

Nor are there municipal liability claims pending against the City of Laconia or the Town of Belmont. Following *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978), both

the District Court and the Court of Appeals awarded summary judgment on behalf of the City of Laconia and Town of Belmont. (App. E at 41a; Respondents' App. A, Amended Opinion at 1a.) As a consequence of those rulings, judgment was automatically rendered in favor of Respondents Detective Gunter, Sergeant Loanes and Sergeant Nielsen to the extent they had been sued in their official capacities. *See Hafer* v. *Melo*, 502 U.S. 21 (1991); *Kentucky* v. *Graham*, 473 U.S. 159 (1985); *Brandon* v. *Holt*, 469 U.S. 464 (1985). There were no supervisory claims. Because the petitioner has not sought review on certiorari of the judgment in favor of the defendants on the municipal and official capacity claims, those claims are not before this Court.

The only surviving claims are the unreasonable seizure (i.e., shooting) claims against individual respondents sued in their individual capacities, to which qualified immunity is a complete and early defense. *See Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982). One of the plaintiff's arguments against Detective Gunter individually was that there were disputed issues of material fact precluding summary judgment on the question of whether Detective Gunter reasonably believed that it was necessary to shoot Philip St. Hilaire in self-defense at the moment St. Hilaire reached for his gun. Both the District Court and the Court of Appeals found the argument to be without merit (App. E at 38a; App. D at 16a), and the Petitioner has not re-raised the argument in the Petition for Certiorari. Thus, what remains of this case is the First Circuit Court of Appeals' response to the petitioner's core claim: whether Respondent Nielsen in uniform and Respondents Gunter and Loanes in plain clothes could have maintained the objectively reasonable belief that they were complying with clearly established constitutional principles as they rushed toward St. Hilaire's vehicle, allegedly without announcing their identity and purpose. *See Harlow*, 457 U.S. at 818. Since the answer is in the affirmative, the opinion of the Court of Appeals is correct, and certiorari should be denied.

Because St. Hilaire was in the driver's seat of a vehicle with the engine running, he was not "seized" within the meaning of the Fourth Amendment until he was shot. A seizure occurs "only when there is a governmental termination of freedom of movement *through means intentionally applied.*" *Brower* v. *County of Inyo*, 489 U.S. 593, 597 (1989) (emphasis in original). "An arrest requires *either* physical force . . . *or* where that is absent, *submission* to the assertion of authority. *California* v. *Hodari D.*, 499 U.S.621, 626 (1991) (emphasis in original). It is not a seizure, but an unreasonable seizure that imposes liability. *Graham* v. *Conner*, 490 U.S. 386 (1989) established that "*all* claims that law enforcement officers have used excessive force — deadly or not — . . . should be analyzed under the Fourth Amendment and its 'reasonableness' standard. . . . . 490 U.S. at 395 (emphasis in original). *Tennessee* v. *Garner*, 471 U.S. 1 (1985) advised that deadly force is reasonable "if the suspect threatens the officer with a weapon . . . if, where feasible, some warning has been given." 471 U.S. at 11-12. However, the absence of a contemporaneous warning does not defeat the justification for the use of lethal force, when it is necessary. *See, e.g., McLenagan* v. *Karnes*, 27 F.3d 1002, 1007 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 581 (1994); *Kruger* v. *Fuhr*, 991 F.2d 435, 440 (8th Cir. 1993). No Fourth Amendment rule requires that only a uniformed officer must execute a warrant or perform a seizure. *Cf. Drewitt* v. *Pratt*, 999 F.2d 774, 780 (4th Cir. 1993). The Constitution does not mandate that officers verify that a subject has visually or audibly identified them as police. *Cf. Sledd* v. *Lindsay*, 864 F.Supp. 819, 830 (N.D. Ill. 1994).

Contrary to the position the petitioner urges upon this Court, Fourth Amendment jurisprudence does not state that officers executing a search warrant must announce their identity and purpose. Eschewing a *per se* reasonableness rule, this Court in *Wilson* taught that adherence to the knock-and-announce rule is merely a factor which may be considered in a reasonableness analysis under the Fourth Amendment. *Wilson*, 115 S. Ct. at 1915; *see also, Sabbath* v. *United States*,

391 U.S. 585 (1968); *Ker* v. *California*, 374 U.S. 23 (1963).

However, a reason for not observing the knock-and-announce rule exists where evidence such as drugs, may be easily destroyed. *See, e.g., Ker*, 374 U.S. at 56; *United States* v. *Sagaribay*, 982 F.2d 906 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 160 (1993); *United States* v. *Bonner*, 874 F.2d 822 (D.C. Cir. 1989). Another exception exists when the subject of the search is thought to be armed, or there is some other reason to believe that following the rule will increase, rather than decrease the level of danger. *See, e.g., Sabbath*, 391 U.S. at 591; *Ker*, 374 U.S. at 56-58, *Miller* v. *United States*, 357 U.S. 301, 309 (1958); *United States* v. *Kane*, 637 F.2d 974 (3rd Cir. 1981); *cf. Lavoie* v. *Town of Hudson*, 740 F.Supp. 88, 93-94 (D. N.H. 1990). Thus, the Fourth Amendment reasonableness standard recognizes occasions when the need to surprise may overcome the need to identify and announce.

It is in the context of these Fourth Amendment principles that the First Circuit considered the plaintiff's contention that the officers' failure to identify themselves as such caused the constitutionally excessive use of force. The petitioner asserts that the courts below committed reversible error by awarding summary judgment to the defendants in the face of a factual dispute over whether the respondents identified themselves. *See* Fed. R. Civ. P. 56(c); *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 322-23 (1986); *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986). The First Circuit recognized that the defendants had offered substantial evidence that they shouted combinations of "Phil," "Police," "Freeze," as they ran toward St. Hilaire's vehicle, but joined the District Court in assuming without deciding that the defendants had not succeeded in announcing their identity and purpose to St. Hilaire. Nevertheless, both the District Court and the First Circuit found the identification issue immaterial to summary judgment disposition. (App. D. at 11a—11b, 16a—18a; App. E at 28a—29a, 38a n.2.)

Even adopting the plaintiff's version of the facts for the purpose of resolution on summary judgment, the First Circuit

found no violation of constitutional rights that were clearly established at the time of the incident in 1990. Assuming without finding that this Court's 1995 decision in *Wilson* v. *Arkansas* (which concerns the execution of warrants on dwellings not vehicles) applied to the plaintiff's case, the plaintiff's theory of recovery succeeded only if the notice requirement was permanently affixed to the Fourth Amendment analysis in 1990, and the *Wilson* decision merely restated existing law. However, this Court in *Wilson* announced that it had never previously held that the knock-and-announce rule was an element of the reasonableness inquiry. *Wilson*, 115 S. Ct. at 1918. (App. B at 21a—22a.)

If the principle was not clearly established as to dwellings, its application to police officers approaching vehicles was even less clear. (*See* App. D at 21a n.6.) Thus, the First Circuit correctly ruled that Respondents Detective Gunter, Sergeant Nielsen and Sergeant Loanes were entitled to qualified immunity on the plaintiff's unreasonable seizure claims. (App. D at 23a.) Certiorari should be denied based upon the First Circuit's correct application of this Court's recent decision in *Wilson*.

The Court of Appeals' decision drew no distinction among respondents and yet it is appropriate to do so. Sergeant Nielsen was in uniform and the argument that he was not identifiable as a police officer is unconvincing. Sergeant Loanes was in plain clothes but, as Sergeant Nielsen, had no physical contact with Philip St. Hilaire, and neither can be said to have "seized" him in a constitutional sense. At most, those respondents are chargeable with executing a search warrant in an unreasonable manner, and not committing the alleged unreasonable seizure that is the source of the plaintiff's damages claim. Only Detective Gunter seized the plaintiff, but the seizure was reasonable. Assuming without admitting that he failed to identify himself, circumstances placed him at the window of St. Hilaire's vehicle, and in the blink of an eye, he had to decide whether to shoot or be shot. For reasons

stated by the First Circuit, he was properly accorded qualified immunity.

II. In View of the Correctness of the First Circuit Court of Appeals' Decision, the Supreme Court Should Not Grant Certiorari to Decide Whether the Objective Reasonableness Test for Qualified Immunity in Fourth Amendment Excessive Force Cases Is the Same as the Objective Reasonableness Test Applied on the Merits, or a More Generous Test for Qualified Immunity Governs as in Fourth Amendment Warrant Cases.

The petitioner asserts that the federal courts are in conflict as to how the qualified immunity defense should apply to excessive force cases under the Fourth Amendment, some stating that the same objective reasonableness test governs on the merits as on qualified immunity, with other courts holding that even an officer whose conduct violated the Fourth Amendment may avail himself or herself of the qualified immunity defense. While this is an important and unsettled area of federal law, this case need not be the vehicle for its resolution, since the decision below reached a correct result.

The scope and application of the qualified immunity defense to excessive force claims under the Fourth Amendment is a matter of some debate. In *Graham*, this Court did not reach the question of whether qualified immunity was a defense to a Fourth Amendment excessive force claim. 490 U.S. at 399, n.12. Lower federal courts, however, permit the qualified immunity defense to excessive force claims, with disagreement centering around whether the objective reasonableness standard for the substantive Fourth Amendment claim is synchronous with the "objective reasonableness" standard for qualified immunity.

In Fourth Amendment cases involving probable cause for searches and arrests, this Court has plainly determined that, while a Fourth Amendment violation may have occurred, the

offending officer is nevertheless entitled to the benefit of qualified immunity. Under the classic articulation of the qualified immunity defense, "government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*, 457 U.S. at 818. However, the Supreme Court has provided liberal amplifications of the rule. *Malley* v. *Briggs*, 475 U.S. 335 (1986), instructed that qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." 475 U.S. at 341. Immunity will be extended, "unless *no* reasonably competent officer would have concluded" that the conduct complied with the Constitution. 475 U.S. at 341 (emphasis added). However, "if officers of reasonable competence could disagree" on whether the conduct was constitutional, immunity applies. 475 U.S. at 341.

Again, choosing its language carefully, this Court in *Anderson* v. *Creighton*, 483 U.S. 635 (1987), stated that the pertinent question is whether "a reasonable officer *could* have believed . . . [the conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed". 483 U.S. at 641 (emphasis added); *see also Hunter* v. *Bryant*, 112 S. Ct. at 536. Under *Anderson*, immunity applies if officers reasonably, but mistakenly believe that their conduct complies with the Fourth Amendment. 483 U.S. at 641. The dissent in *Anderson* criticized the Court for fashioning this "double standard" for Fourth Amendment analysis, one for merits consideration and the other for qualified immunity. 483 U.S. at 659. In sum, in the Fourth Amendment areas already addressed by the Supreme Court, this Court has indicated that, notwithstanding a constitutional violation, an individual police officer may be entitled to qualified immunity.

Lower federal courts, in applying immunity to excessive force cases, have assumed that the defense exists. *See, e.g., In re: City of Philadelphia Litigation*, 49 F.3d 945, 972 (3d

Cir. 1995); *Kelly* v. *Bender*, 23 F.3d 1328, 1331 (8th Cir. 1994); *Jackson* v. *Beaumont Police Department*, 958 F.2d 616, 620 (5th Cir. 1992) ("Qualified immunity is a defense to an excessive use of force claim under the Fourth Amendment"); *Finnegan* v. *Fountain*, 915 F.2d 817, 823-24 (2nd Cir. 1990).

Some courts have reasoned that the "objective reasonableness" standard is the same on the substantive claim as it is on the qualified immunity defense. *See, e.g., Wardlaw* v. *Pickett*, 1 F.3d 1297, 1303 (D.C. Cir. 1993) (*Bivens* action) ("[T]he scope of qualified immunity must be evaluated using the same 'objective reasonableness' criteria with which *Graham* directs us to scrutinize an officer's actions under the Fourth Amendment. We believe that standard provides the test for evaluating both the scope of the officer's qualified immunity as well as the plaintiff's claim of excessive force under the fourth amendment"), *cert. denied*, 114 S. Ct. 2672 (1994); *Hopkins* v. *Andaya*, 958 F.2d 881, 885, n.3 (9th Cir. 1992); *Austin* v. *Hamilton*, 945 F.2d 1155, 1161-62 (10th Cir. 1991); *Quezada* v. *County of Bernalillo*, 944 F.2d 710, 718 (10th Cir. 1991).

However, others have adopted a more generous standard in considering the actions of individual officers. They speak not in terms of what a reasonable officer would or should have done, but could have done, and afford immunity unless *no* reasonable police officer *could* have believed that his or her conduct complied with the Constitution. *See, e.g., Slattery* v. *Rizzo*, 939 F.2d 213, 216 (4th Cir. 1991) ("A police officer should prevail on an assertion of qualified immunity if a reasonable officer possessing the same information *could* have believed that his conduct was lawful.... If a reasonable officer could have found probable cause to believe that [the plaintiff] presented a serious threat of personal harm at the time that [the officer] pulled the trigger, then, as a matter of law, the [officer] is entitled to qualified immunity"); *Jones* v. *Webb*, 45 F.3d 178, 183 (7th Cir. 1995); *Kelly*, 23 F.3d at 1331; *Febus-Rodriguez* v. *Betancourt-Lebron*, 14 F.3d 87,

91 (1st Cir. 1994); *Finnegan*, 915 F.2d at 823-24 ("even if the jury finds [the defendant officer] to have used constitutionally excessive force, it is for the district court to determine whether the unlawfulness of his conduct should have been apparent to [the officer] at the time"); *Wyche* v. *City of Franklinton*, 837 F. Supp.137, 141-42 (E.D. N.C. 1993).

Even those courts stating that there is only one tier of analysis frequently imply that immunity could be invoked if *any* officer could reasonably have believed that the conduct comported with clearly established law. *See, e.g., Wardlaw*, 1 F.3d at 1303 ("excessiveness of the force is so apparent that no reasonable officer could have believed in the lawfulness of his actions"); *Street* v. *Parham*, 929 F.2d 537, 540 (10th Cir. 1991) ("No officer could reasonably believe that the use of unreasonable force did not violate clearly settled law").

The decisions of this Court in the warrant area and those of lower federal courts in excessive force cases show an intent to protect under the doctrine of qualified immunity even those police officers who operate on the outer perimeter of reasonable conduct. It may be that a citizen's Fourth Amendment right to be free of excessive force was violated when scrutinized under the "objective reasonableness" test on the merits, and yet the individual officer involved should be relieved from personal liability for public policy reasons if that officer *could* have maintained the "objectively reasonable" belief that his or her conduct complied with then-existing federal law. One test reviews the merits to determine whether there was a constitutional violation. The other, more liberal standard reviews the conduct of an individual state actor and provides immunity if reasonable police officers could differ as to whether there was a violation of clearly established constitutional law. The distinction is similar to the difference between *de novo* and clearly erroneous review. In some cases, where the only defendants are police officers sued in their individual capacities, that may mean that the plaintiff does not recover. In others, where for example, a municipal defendant is not eligible for the defense, *see Owen* v. *City of*

Independence, 445 U.S. 622 (1980), it does not, because liability may be imposed upstream. *Cf. Hinton* v. *City of Elwood*, 997 F.2d 774, 782-83 (10th Cir. 1993); *Medina* v. *Denver*, 960 F.2d 1493, 1499-1500 (10th Cir. 1992); *Hopkins*, 958 F.2d at 888.

Returning to the case at hand as an example, even assuming without admitting that Detective Gunter had failed to announce his authority and purpose as he approached St. Hilaire's vehicle with his badge in one hand and his gun in the other, reasonable police officers could differ as to whether he was justified in shooting Philip St. Hilaire when it appeared that St. Hilaire reached for his gun. To fail to award immunity under that situation could make for timorous, ineffective police officers. On the other hand, if a constitutionally defective policy or custom regarding how warrants were executed, or supervisory "deliberate indifference" as to whether the manner in which the raid was planned and executed was affirmatively linked to the unnecessary use of deadly force against Philip St. Hilaire, then a municipality or the raid supervisors could be held liable for the Fourth Amendment violation, while relieving Detective Gunter of personal liability for simply having been positioned in the wrong place at the wrong time: a conduit for the constitutional deprivation but not himself a cause. *See Hinton, supra; Medina, supra; Hopkins, supra.*

However, that is not the posture in which this case has reached this Court, and therefore the issues raised need not be decided on certiorari. Only individual officers in their individual capacities are respondents and irrespective of whether, upon further scrutiny, this Court would find an underlying Fourth Amendment violation, the only issue squarely before the Court would continue to be whether the First Circuit Court of Appeals properly granted qualified immunity, and it did.

In finding that the identify and announce rule was not incorporated into the reasonableness analysis under the Fourth Amendment until *Wilson*, the First Circuit rejected

the petitioner's most compelling thesis. Moreover, the Court of Appeals opinion does not rely upon a difference between the objective reasonableness standard for liability and a qualified immunity defense. In fact, in a footnote, the Court said the tests are "most likely the same. . . . In any event, we draw on the cases decided in the liability context for guidance in deciding the qualified immunity question." (App. D at 14a n.2.) Consequently, although the question of differing standards of objective reasonableness is an interesting and important one, its resolution is not necessary to the disposition of this case.

III. In View of the Correctness of the First Circuit Court of Appeals' Decision, the Supreme Court Should Not Grant Certiorari to Determine When Fourth Amendment Scrutiny Should Begin in a Self-defense Shooting Case: at or Near the Time of the Seizure (i.e., Shooting), or the Events Leading up to it.

The petitioner has contended that the First Circuit erred in not subjecting the entire series of events that preceded the shooting to Fourth Amendment scrutiny under the "objective reasonableness" test of *Graham* and *Garner* and has suggested that the following factors should have been considered:

> (1) the manner in which the officers conducted their search; (2) the method of conducting their seizure; (3) the preceding circumstances leading to use of deadly force, including lack of identification as state officials; (4) the decedent's prior cooperative encounters with law enforcement agents; (5) the potential risk of flight by decedent; (6) the severity of the crime; (7) the lack of an immediate threat to officers or others.

(Pet. for Cert. at 9.) The petitioner proposed this list of alternatives for providing notice of police presence, identity and purpose to St. Hilaire:

> audibly announcing their presence with an amplifier; warning St. Hilaire by sounding their sirens; insuring that a uniformed officer be the first to approach his car; or choosing any other effective method of providing notice.

(Pet. for Cert. at 18.)

The petitioner thus raises the issue of when Fourth Amendment scrutiny attaches in an intentional shooting case against individual police defendants. It is the within respondents' position that this issue need not be addressed on certiorari, because the petitioner has misunderstood the First Circuit's decision. The ruling was based upon the defense of qualified immunity, which is available to defendants sued in their individual capacities. The defense prevails whether or not there was an underlying constitutional violation, so long as the federal right violated was not clearly established at the time of the incident. *Harlow, supra.* Although the First Circuit stated that both the defendants and the District Court erred in focusing on the moment of the shooting and that the law of the Circuit would evaluate the objective reasonableness of officer conduct in the light of earlier events, such a review was unnecessary to the Court's decision. Where, as here, a constitutional right crucial to the plaintiff's recovery is not clearly established at the time of the incident, the plaintiff's claim necessarily fails, whether or not the entire incident was reviewed for reasonableness under the Fourth Amendment. The centerpiece of the plaintiff's theory of recovery, the need for police to announce their authority and purpose, was not clearly established at the time, and thus the individual capacity claims against Respondents Detective Gunter, Sergeant Loanes and Sergeant Nielsen should not succeed.

The petitioner nevertheless asks this Court to grant certiorari to adopt a rule that at least the First, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Circuits have considered and rejected. In lethal force scenarios leading ultimately to a seizure, decisions of these courts apply Fourth Amendment

scrutiny to the seizure itself, and not to whether antecedent events involved poor decisions or violations of standard operating procedures; whether better, less dangerous alternatives were available; or whether the officer who shot was adequately identifiable audibly or visually. Under these decisions, the shooting was the seizure and only that received Fourth Amendment review under a reasonableness test. *See, e.g.*, *Schulz* v. *Long*, 44 F.3d 643, 648 (8th Cir. 1995) ("[T]he Fourth Amendment prohibits unreasonable seizures, not unreasonable or ill-advised conduct in general. Consequently, we scrutinize only the seizure itself, not the events leading to the seizure, for reasonableness under the Fourth Amendment"); *Roy* v. *Inhabitants of City of Lewiston*, 42 F.3d 691, 696 (1st Cir. 1994) (although "[t]he police may have done the wrong thing . . . they were not 'plainly incompetent' nor were their actions 'clearly proscribed'"); *Scott* v. *Henrich*, 39 F.2d 912, 915 (9th Cir. 1994) (requiring officers to choose the least intrusive alternative would "induce tentativeness[,] . . . deter police from protecting the public . . . [and] entangle the courts in endless second-guessing of police decisions . . ."), *cert. denied*, 115 S. Ct. 612 (1995); *Plakas* v. *Drinsky*, 19 F.3d 1143, 1150 (7th Cir. 1994) ("it is from that point on [plaintiff's decedent's cocking a poker over his head and charging the officer] that we judge the reasonableness of the use of deadly force in light of all that the officer knew"), *cert. denied*, 115 S. Ct. 81 (1994); *Drewitt* v. *Pratt*, 999 F.2d 774, 780 (4th Cir. 1993) (whether officer's failure to identify himself was contributory was considered irrelevant by the court, the issue being, "whether at the moment of the shooting [the officer] had probable cause to believe [the suspect] posed a threat of death or serious bodily harm to him"); *Cole* v. *Bone*, 993 F.2d 1328, 1334 (8th Cir. 1993) ("[The officer's] decision to use deadly force might not have been the most prudent course of action . . . The Constitution, however, requires only that the seizure be objectively reasonable . . ."); *Carter* v. *Buscher*, 973 F.2d 1328, 1333 (7th Cir. 1992) ("Even if the defendants concocted a dubious scheme to bring about [the suspect's] arrest,

it is the arrest itself and not the scheme that must be scrutinized for reasonableness under the Fourth Amendment"); *Tom* v. *Voida*, 963 F.2d 952, 962 (7th Cir. 1992) (regardless of preceding events, less intrusive means not available at time of shooting); *Fraire* v. *City of Arlington*, 957 F.2d 1268, 1276 (5th Cir. 1992) ("regardless of what had transpired up until the shooting itself, [the suspect's] movements gave the officer reason to believe, at least at that moment, that there was a threat of physical harm), *cert. denied*, 113 S.Ct. 462 (1992); *Rhodes* v. *McDaniel*, 945 F.2d 117, 120 (6th Cir. 1991) (estate argued that officer created need for use of excessive force; the Court of Appeals found that officer justifiably acted in self-defense), *cert. denied*, 112 S. Ct. 872 (1992); *Greenidge* v. *Ruffin*, 927 F.2d 789, 792 (4th Cir. 1991) (officer's use of deadly force should be evaluated with respect to circumstances existing immediately prior to and at the moment force used; evidence of what occurred before not relevant); *Young* v. *City of Killeen*, 775 F.2d 1349, 1353 (5th Cir. 1985) (contention that officer created situation where fatal error was more likely possible basis for state negligence action, but not Fourth Amendment claim); *Sledd* v. *Lindsay*, 864 F. Supp. 819, 830 (N.D. Ill. 1994) ("there existed no clear standard of law that an officer must obtain confirmation that the threatening suspect knows that he is confronting a peace officer prior to using deadly force"); *James* v. *City of Chester*, 852 F. Supp. 1288, 1295 (D. S.C. 1994) (theory police unreasonably increased risk by earlier actions rejected; the Court would "focus only upon the reasonableness of the conduct at the moment [the officer] made the decision to use deadly force"); *Williams* v. *Richmond County, Ga.*, 804 F. Supp. 1561 (S.D. Ga. 1992) (even if errors in judgment were made in resolving situation, it could not be said that use of deadly force was unreasonable where woman advanced with weapon).

Only a few of the cases reviewed support the petitioner's premise, and those are distinguishable because the defendant officer intentionally provoked circumstances in which deadly

force would be required. *See, e.g., Estate of Starks* v. *Enyart*, 5 F.3d 230(7th Cir. 1993) (fact dispute existed on whether suspect attempted to run officer over, in which case, deadly force would be justified, or whether officer jumped in front of vehicle, thereby manufacturing incident); *Gilmere* v. *City of Atlanta*, 774 F.2d 1495 (11th Cir.1985) (officer's improper use of power in beating suspect created need to use deadly force when suspect retaliated), *cert. denied*, 476 U.S. 1115 (1986).

In contrast, in the vast majority of cases, an officer's self-defense shooting is reviewed for Fourth Amendment reasonableness at or near the moment of the shooting itself. A rationale for taking a longer look backward could exist where the defendant was a municipality or supervisor and past patterns or practices or decisions involving the planning or execution stages of an event were said to have created the risk that ultimately caused the constitutional harm. However, since only individual defendants in their individual capacities are respondents before this Court, those are issues that need not be considered on certiorari. For the foregoing reasons, this Court should decline petitioner's invitation to establish a rule about when Fourth Amendment scrutiny should begin in a self-defense police shooting case.

CONCLUSION

Wherefore, respondents City of Laconia, Town of Belmont, Detective David A.Gunter, Sergeant Brian Loanes, and Sergeant David Nielsen request that the petitioner's Petition for a Writ of Certiorari be denied.

Respectfully submitted,
CITY OF LACONIA, TOWN OF BELMONT,
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United States Court of Appeals
For the First Circuit

No. 95-1463

KATHY ST. HILAIRE, ETC.,

PLAINTIFF, APPELLANT,

v.

CITY OF LACONIA, ET AL.,

DEFENDANTS, APPELLEES.

ERRATA SHEET

The opinion of this Court issued on December 1, 1995, is amended as follows:

On page 22, the first paragraph should be deleted and the following paragraph inserted in its place:

Summary judgment in favor of the municipalities, the City of Laconia, the Town of Belmont and the County of Belknap, is affirmed because there is no evidence, even had the plaintiff shown a deprivation of St. Hilaire's constitutional rights, that it was as a result of official action taken pursuant to a "custom or usage" of the municipality. *See Monell* v. *New York City Dep't. of Social Servs.*, 436 U.S. 658, 691 (1978). Other than this single incident, there is no evidence even proffered to show such a municipal "custom and usage." Evidence of a single incident is usually unsufficient to establish a "custom or usage." *Mahan* v. *Plymouth County House of Corrections*, 64 F.3d 14, 16-17 (1st Cir. 1995).